

1959

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Recommended Citation

Boshkoff, Douglass, "Non-Domiciliary Decedents' Estates: A Problem for Title Examiners in New York" (1959). *Articles by Maurer Faculty*. Paper 1060.

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NON-DOMICILIARY DECEDENTS' ESTATES: A PROBLEM FOR TITLE EXAMINERS IN NEW YORK

DOUGLASS G. BOSHKOFF*

INTRODUCTION

IT IS not uncommon during the examination of title to real property to find the devolution of ownership in some manner dependent upon the proper administration of a decedent's estate. In the case of testacy the devisees or executor with a valid testamentary power of sale may have conveyed or may have been defendants in an action designed to reach their interests. Alternatively, the property may have been sold by either an administrator or executor in an attempt to secure funds to pay creditors¹ or the representative² of the estate may have foreclosed a mortgage belonging to the decedent.

In each case it is necessary for the examiner to carefully study the papers on file in the surrogate's office to make sure that the estate has been properly administered, to further determine that the persons dealing with the property are fully authorized, and, as far as it is reasonably possible, to ascertain that there is no one who will later object to the manner in which title has been passed through the estate. Thus, he is not only interested in an unbroken line of title from grantor to grantee, he must evaluate any risk involved as it affects marketability and be certain there is competent evidence to support each link in the chain of title.³ Even if he is sure that the risk is low, he must satisfy himself that the records on which title is based will be admissible in evidence if the title is questioned.

It would be appreciably simpler for New York title attorneys if owners of New York real property were kind enough to be domiciled in New York at their death. Unfortunately, it is quite common now to find that title to the New York realty is derived through the estate of a foreign domiciliary with a record of the proceedings being recorded pursuant to the authorization found in the New York Decedent Estate Law.⁴ In this instance the examiner must determine the meaning and effect of the New York statute, become familiar with some of the probate law

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1. N.Y. Surr. Ct. Act §§ 233-50.

2. Representative is used for either executor or administrator where there is no relevant difference in their capacity.

3. 4 American Law of Property § 18.11, at 678-79 (Casner ed. 1952).

4. N.Y. Deced. Est. Law § 44.

of the foreign jurisdiction involved, and examine a file scantier than that available when a local proceeding is involved.

The New York statute is not clear on all the consequences of recording. It has a few counterparts in other jurisdictions. These statutes have been criticized as "undesirable relics," presumably because of their lack of clarity.⁵ In this article I shall attempt to examine the effect and defects of the New York statute permitting recording and indicate certain problems peculiar to examination of a non-domiciliary estate.

ANCILLARY PROCEEDINGS AND SECTION 44

Upon the death of a foreign domiciliary owning property with a situs in New York it is customary to offer the will for probate or secure administration in the domiciliary jurisdiction and then validate title to the New York property through ancillary proceedings. Based upon the foreign proceeding,⁶ a representative may be appointed in New York.⁷ The issuance of ancillary letters is, however, mainly for the protection of creditors within the state.⁸

In addition, section 44 of the New York Decedent Estate Law permits recordation of a foreign probated will and record of probate or record of administration whenever title to New York realty is in question. Prior to 1945 this was the only authorization for establishing title by descent or devise through a non-resident decedent when only realty was involved.⁹ In that year the New York Surrogate's Court Act was amended so that ancillary administration might be obtained even though real property was the only asset within the state.¹⁰ The way was thus opened for appointment of an ancillary representative when it was necessary to sell the decedent's property to satisfy creditors.¹¹

Section 44 apparently establishes only a rule of evidence. Although title passes under the will upon the death of the testator, some form

5. Atkinson, *The Uniform Ancillary Administration and Probate Acts*, 67 *Harv. L. Rev.* 619, 630 (1954).

6. N.Y. Surr. Ct. Act §§ 159, 160.

7. N.Y. Surr. Ct. Act § 161 sets forth the priority of persons entitled to appointment as ancillary representative.

8. *Matter of Cornell*, 267 N.Y. 456, 465, 196 N.E. 396, 400 (concurring opinion), cert. denied, 297 U.S. 708 (1935); *Spratt v. Syms*, 104 App. Div. 232, 235, 93 N.Y. Supp. 728, 730 (1st Dep't 1905).

9. Ancillary letters could be issued in the case of a nonresident dying outside of New York only when personal property was within the state. Principal letters could be secured only upon proof of the original will in New York, difficult where the law of the domiciliary state prohibited its removal. See *Spratt v. Syms*, 104 App. Div. 232, 93 N.Y. Supp. 728 (1st Dep't 1905).

10. N.Y. Sess. Laws 1945, ch. 517.

11. N.Y. Surr. Ct. Act § 234.

of judicial recognition is required to make the will admissible in evidence.¹² Where real estate passes under the will the law of the situs controls and there must be some form of ancillary proceeding.¹³ In the case of intestacy, the proceeding for administration will establish heirship,¹⁴ but again there is the need for an ancillary proceeding. Section 44 gives evidentiary validity to the record of probate or administration. It is not clear whether this evidentiary value is derived from a relaxation of the rule mentioned above or from the fact that recording is a form of probate proceeding. As we shall see later¹⁵ this distinction is quite important.

The courts of New York have been forced to consider the effect of section 44 in related areas. There are a group of cases which hold that recording a will is equivalent to probate in this state for the purpose of allowing a spouse to exercise her right of election¹⁶ and for permitting the surrogate to fix the bond of a foreign representative,¹⁷ issue ancillary letters of trusteeship,¹⁸ and entertain a proceeding for construction of a will.¹⁹ In the last case, the following was stated:

It is obvious from a perusal of the specified requirements for such record that the determination of whether or not [recording] . . . may be permitted in any given instance contemplates the performance of a judicial act in passing upon the validity of execution of the instrument, and of its establishment as one sufficient to convey real property in accordance with the laws of this State. It is, therefore, in spirit and in fact a proving of the will to like extent though by a different method from that in vogue respecting the usual will of a domestic decedent.²⁰

Too much emphasis is placed upon the action of the surrogate in determining whether the documents presented are recordable. For example, he must satisfy himself that the will was executed in accordance with the laws of the testator's domicile or those of the place of execution or in accord with the domestic law of New York. Actually, his action

12. *Adams v. Norris*, 64 U.S. (23 How.) 353 (1859); 2 Patton, *Titles* § 524, at 392 (2d ed. 1957); 3 *American Law of Property* § 14.36, at 716 (Casner ed. 1952).

13. *McCormick v. Sullivant*, 23 U.S. (10 Wheat.) 192 (1825); accord, *Robertson v. Pickrell*, 109 U.S. 608 (1883).

14. 3 *American Law of Property* § 14.43 (Casner ed. 1952); 4 *id.* § 18.65, at 789.

15. See pp. 519-25 *infra*.

16. *Matter of Tamburri*, 198 Misc. 809, 100 N.Y.S.2d 647 (Surr. Ct. 1950).

17. *Matter of Walker*, 117 Misc. 805, 191 N.Y. Supp. 676 (Surr. Ct. 1921), *aff'd*, 203 App. Div. 844, 196 N.Y. Supp. 957 (1922).

18. *Matter of Sabin*, 155 Misc. 507, 280 N.Y. Supp. 211 (Surr. Ct. 1935). But see *Spratt v. Syms*, 104 App. Div. 232, 93 N.Y. Supp. 728 (1st Dep't 1905); 5 Warren, *Surrogates' Courts* § 463(2) (6th ed. 1941).

19. *Matter of Von Deilen*, 154 Misc. 877, 278 N.Y. Supp. 689 (Surr. Ct. 1935) ("recorded" under N.Y. Deced. Est. Law § 44 equivalent to "proved" as referred to in N.Y. Surr. Ct. Act § 40(8)).

20. *Id.* at 879-80, 278 N.Y. Supp. at 691.

is analogous to that of a clerk in any county clerk's office who determines that a deed is properly signed and acknowledged and therefore entitled to recordation. Confusion results from the fact that it is customary to prepare a petition and order admitting the documents to record²¹ and also because the fact finding prior to recordation may be more complicated than if only a deed were involved. This conclusion is supported by the cases discussed in the next section²² which hold that a document recorded pursuant to section 44 or an analogous statute in another jurisdiction is not entitled to the benefit of that section if improperly authenticated. The action of the surrogate adds nothing to the record.

What about the cases mentioned above that stand for the proposition that recording is equivalent to proving? They are examples of judicial response to an incomplete procedure for recognizing certain foreign probate decrees. If, for instance, it is assumed that a spouse's right of election ought not to be defeated by probate outside New York, the decision in the *Tamburri* case is right but the reasoning is questionable. The spouse's right should be protected even though recording is not equivalent to probate, not because the two are the same.

Other jurisdictions have similar statutes on this subject. Comparing them briefly we find that in Georgia,²³ Illinois,²⁴ North Carolina,²⁵ Texas,²⁶ and Wisconsin,²⁷ as in New York, the legislation applies only to wills of real property. Wills of personalty are included in the District of Columbia,²⁸ Maryland,²⁹ Missouri,³⁰ and New Jersey.³¹

It is a common requirement that the will and certain accompanying documents must be recorded in an appropriate office,³² but in North

21. 11 Carmody & Wait, *Cyclopedia of New York Practice* §§ 828, 829 (1954); 5 Warren, *op. cit. supra* note 18, § 462(4).

22. See pp. 519-21 *infra*.

23. Ga. Code Ann. § 113-709 (Supp. 1955).

24. Ill. Ann. Stat. c. 30, § 32 (Smith-Hurd 1935).

25. N.C. Gen. Stat. § 8-32 (1953).

26. Tex. Prob. Code Ann. § 96 (1956).

27. Wis. Stat. Ann. § 310.075(1) (1957).

28. D.C. Code Ann. § 14-402 (1951).

29. Md. Ann. Code art. 93, § 388 (1957).

30. Mo. Ann. Stat. § 474.370 (1956).

31. N.J. Stat. Ann. § 3A:3-28 (1953).

32. Ill. Ann. Stat. c. 30, § 32 (Smith-Hurd 1935) (will and exemplification of record to be recorded); Md. Ann. Code art. 93, § 388 (1957) (will and copy or certificate of probate); Mo. Ann. Stat. § 474.370 (1956) (wills and the probate thereof); N.J. Stat. Ann. § 3A:3-28 (1953) (will, record of will and record of grant of letters testamentary); Wis. Stat. Ann. § 310.075(1) (1957) (will and its probate); Tex. Prob. Code Ann. § 96 (1956) (will and its probate).

Carolina³³ and evidently in the District of Columbia,³⁴ the will may be read directly into evidence if it has been probated elsewhere. In Wisconsin there is a separate proceeding, not an ancillary probate, which produces a recordable certificate indicating what interests passed by the will.³⁵ Four statutes provide that the will when probated will have the same force and effect as a domestic probated will.³⁶ It has been suggested that if a proceeding in a non-domiciliary jurisdiction is truly ancillary there is no objection to giving the ancillary proceeding a greater effect than is obtainable at the domicile.³⁷ The New York statute is silent on this point.

Only two states specify how a recorded will may be contested.³⁸ The New York statute is again silent in this respect. However, the New York statute and that of New Jersey³⁹ are the only two which wisely cover the possibility of intestate as well as testate succession.

While the statutes mentioned are far from identical, there is enough similarity so that cases decided under their provisions will furnish a springboard for answering questions not yet considered by the New York courts.

THE EXAMINATION OF NEW YORK RECORDS

In examining a file in the surrogate's office it should first be ascertained whether the papers are properly authenticated. The New York requirements for authentication are found in sections 44 and 45 of the Decedent Estate Law. The copy of the will "must be authenticated by the seal of the court or officer by which or whom such will was established or admitted to probate . . . or having the custody of the same or the record thereof, and the signature of a judge of such court or the signature of such officer and of the clerk of such court or officer if any."⁴⁰

In addition, under the terms of section 44 a copy of the will and letters testamentary must be accompanied by the proofs or a record of the proofs. If the proofs are not on file in the foreign probate office, then any statement of the substance of the proofs on file should be included. If neither is available then the will may still be recorded. If the will was not executed in this state then the proofs or substance thereof are not necessary.

33. N.C. Gen. Stat. § 8-32 (1953).

34. D.C. Code Ann. § 14-402 (1951). But cf. D.C. Code Ann. § 14-404 (1951).

35. Wis. Stat. Ann. § 310.075 (1957).

36. D.C. Code Ann. § 14-404 (1951); Md. Ann. Code art. 93, § 388 (1957); N.J. Stat. Ann. § 3A:3-28 (1953); Tex. Prob. Code Ann. § 98 (1956).

37. Hopkins, *The Extraterritorial Effect of Probate Decrees*, 53 Yale L.J. 221, 260 (1944); see pp. 519-25 *infra*.

38. Mo. Ann. Stat. § 474.390 (1956); Tex. Prob. Code Ann. §§ 96, 101 (1956).

39. N.J. Stat. Ann. § 3A:3-28 (1953).

40. N.Y. Deced. Est. Law § 45.

If the proofs are not in the file it should not be assumed that they were unavailable. The certificate of the foreign probate court should indicate exactly their disposition.

It was provided in section 2703 of the Code of Civil Procedure,⁴¹ which was a predecessor of section 44, that if no proofs and no statement of the substance of the proofs were on record then the will had to be accompanied by a statement to that effect. In *Matter of Nash*⁴² it was held that the application for recording a will probated in Massachusetts should be denied because the certificate stated only that "our statute does not require that the evidence of the witnesses thereto should be preserved in writing." The statute does not expressly require such a statement now, but since it is necessary to show that the conditions for recording have been fulfilled, such a statement appears necessary.⁴³

The title examiner should not assume that if documents relating to a will or an administration have been accepted for recording they are adequate. The document examined must be properly recorded so as to serve as constructive notice. The situation here is analogous to a deed which is defectively acknowledged and improperly accepted for recording. Such an instrument cannot serve as constructive notice.⁴⁴ In *Beatty v. Mason*⁴⁵ a will had been probated in Kentucky and recorded in Maryland where it was later offered in evidence in a proceeding in probate court. It was held inadmissible since the Kentucky certificate stated only that the will had been "filed for record." The certificate would not be satisfactory unless it clearly indicated eligibility for recording. Similarly, the plaintiff in *Lindley v. O'Reilly*⁴⁶ who had brought an action of ejectment, sought to rely upon a Pennsylvania probated will which had been recorded in New Jersey. It was held error to have admitted the will when the Pennsylvania certificate indicated only that the instrument had been "filed." The fact that there was an attorney's affidavit accompanying the papers swearing that the will had been admitted to probate was not adequate.⁴⁷ The certificate must also leave no doubt that it was probated in accordance with the laws of the domicile,⁴⁸ and a copy of the judgment may even be necessary.⁴⁹

41. 1 Birdseye, Revised Statutes, Codes and General Laws of New York 1105 (1889).

42. 37 Misc. 706, 76 N.Y. Supp. 453 (Surr. Ct. 1902).

43. 5 Warren, op. cit. supra note 18, § 462(2).

44. 4 American Law of Property § 17.17, at 589-90 (Casner ed. 1952).

45. 30 Md. 409 (1868).

46. 50 N.J.L. 636, 15 Atl. 379 (Ct. Err. & App. 1888).

47. Accord, *Fenderson v. Missouri Tie & Timber Co.*, 104 Mo. App. 290, 78 S.W. 819 (1904).

48. *Plenderleith v. Edwards*, 328 Ill. 431, 159 N.E. 780 (1927); *Cobb v. Willrett*, 313 Ill. 92, 144 N.E. 834 (1924).

49. *Green v. Benton*, 3 Tex. Civ. App. 92, 22 S.W. 256 (1893).

Perhaps if there are recitals in the chain of title sufficient to give notice of the contents of the will, a defective authentication need not be fatal.⁵⁰ However, reliance is better placed on a complete record.

In summary, the records of the foreign court should: (1) contain all the proofs required by the statute or an explicit explanation for their absence; (2) clearly indicate that the will has been probated in accordance with the laws of the domiciliary jurisdiction; (3) be authenticated as provided in section 45 of the Decedent Estate Law.⁵¹ Where there is an intestacy only authentication is involved.

ALTERATION OF PROCEEDINGS IN THE FOREIGN JURISDICTION

The status of the proceedings in the foreign jurisdiction may be radically altered. This change may or may not appear in the records in this state and there may be intervening purchasers present. The title examiner should know if it is necessary to determine the status of the proceeding in the domiciliary jurisdiction and the effect of the record in New York. Three changes are possible: (1) administration terminated by subsequent probate, (2) revocation or vacation of original probate, and (3) termination of authority of the estate's representative not accompanied by termination of administration or vacation of probate.

If we assume that the original proceedings in the domiciliary jurisdiction have been properly recorded here, there are three possibilities under each category mentioned above.

Sequence 1: (a) purchase of premises, followed by
(b) change of estate status at domicile, followed by
(c) notice of change recorded in New York.

Sequence 2: (a) change of estate status at domicile, followed by
(b) purchase of premises, followed by
(c) notice of change recorded in New York.

Sequence 3: (a) change of estate status at domicile, followed by
(b) notice of change recorded in New York, followed by
(c) purchase of premises.

Each of the three changes in estate status can be discussed with reference to the three possible sequences.

Administration Terminated by Subsequent Probate

There is always the danger when dealing with intestate succession that a will will later be found and the devisees will claim rights superior to those of purchasers from the heirs. It has been suggested that pur-

50. Weigel v. Green, 218 Ill. 227, 159 N.E. 913 (1905).

51. See Friedberg v. Mechanics Bank, 135 Misc. 194, 237 N.Y. Supp. 378 (New York City Ct. 1929).

chasers relying upon an adjudication of intestacy should be protected to the same extent as those relying upon an adjudication of probate.⁵² In some states there is a time limit within which a will must be probated.⁵³ In New York the rule is that the devisee will prevail if the will is probated and recorded within two years from the death of the testator. If the devisee is under a disability or the will is concealed by an heir the period is extended.⁵⁴ This limitation will apply to wills probated outside New York devising New York realty.

Sequence 1: A purchaser from an heir will not be protected if the change of status (step b-subsequent probate) occurs within two years (disabilities disregarded) of the date of probate. It would seem immaterial that step c is not completed within the two-year period. Although section 46 of the Decedent Estate Law is phrased in terms of a will which is "admitted to probate and recorded" within two years, the "recorded" appears to refer to the recording required when the will is admitted to domestic probate.⁵⁵

Sequence 2: Here there is a purchase of the premises (step b) which intervenes between the change of status at the domicile and recording notice of that change in New York. If less than two years has elapsed since the death of the testator there is no reason to protect the heir or any subsequent purchasers since they took title subject to the infirmity of having it set aside by a devisee.

If the purchase occurs more than two years after the testator's death then the devisee has permitted the record in New York to remain in a misleading condition to the detriment of the subsequent purchaser. This suggests a defense of estoppel. The success of the defense would depend upon the facts of the individual case. Since it appears that something

52. 3 American Law of Property § 14.40, at 734 (Casner ed. 1952); Comment, 36 Mich. L. Rev. 120, 123-24 (1937).

53. 1 Flick, Abstract and Title Practice § 484, at 437-38 (2d ed. 1958); Simes & Basye, Problems in Probate Law (Michian Legal Studies) Appendix A, 275-95 (1946).

54. N.Y. Deced. Est. Law § 46 provides:

"The title of a purchaser in good faith and for a valuable consideration, from the heir of a person who died seized of real property, shall not be affected by a devise of the property made by the latter, unless within two years after the testator's death, the will devising the same is either admitted to probate and recorded as a will of real property in the office of the surrogate having jurisdiction, or established by the final judgment of a court of competent jurisdiction of the state, in an action brought for that purpose. But if, at the time of the testator's death, the devisee is either within the age of twenty-one years, or insane, or imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life; or without the state; or, if the will was concealed by one or more of the heirs of the testator, the limitation created by this section does not begin until after the expiration of one year from the removal of such a disability, or the delivery of the will to the devisee or his representative, or to the proper surrogate."

55. N.Y. Surr. Ct. Act §§ 150, 153.

more than inaction is required,⁵⁶ if the search reveals this condition it should be cleared prior to closing. If there is no indication of this then the examiner must choose between accepting the record on its face and making inquiries in the domiciliary jurisdiction. The value of the premises and the extent of examination desired by the client will furnish the answer to the last question.

Sequence 3: If the notice of change in status (step b) is filed within two years of probate it is clear that the purchaser cannot prevail. If step b does not occur within two years the purchaser should still not prevail unless "recorded" in section 46 refers to recording pursuant to section 44. Reliance on such a construction appears dangerous in the absence of any authority.

Revocation or Vacation of Original Probate

In New York all interested parties are given notice of a probate proceeding. A contest of the will, if any, must be made prior to the order of probate. Once made, the decree of probate is conclusive as to all parties who had notice of the original proceeding⁵⁷ and the only element of non-finality in the judgment is a right of appeal.⁵⁸

This procedure is not representative of probate practice elsewhere in the United States. Often the original probate may be had without notice of any type. Any contest is after probate with notice to all interested parties.⁵⁹ Elsewhere there may be notice upon the original probate but also a provision for subsequent contest.⁶⁰ There is generally a time limit on the right of contest, but within that period the probate decree is not final.⁶¹ For example, in the state of Washington the probate judge may immediately hear the proofs upon the petition for probate of a will and admit it to probate subject only to a right of contest.⁶² Any person interested in contesting the will must appear within six months and file objections at which time a citation is issued to interested parties.⁶³ The probate decree becomes final if no objection has been made at the end of six months.

56. Compare *Meley v. Collins*, 41 Cal. 663, 10 Am. Rep. 279 (1871) (owner not required to have forged deed set aside, not shown that he knew of scheme to defraud purchaser), with *Noe v. Smith*, 67 Okla. 211, 169 Pac. 1108 (1917). See 19 Am. Jur. Estoppel §§107-16 (1939); 2 Warren, *New York Real Property* 280-86 (4th ed. 1951).

57. N.Y. Surr. Ct. Act § 80.

58. N.Y. Surr. Ct. Act §§ 288-310.

59. Simes, *The Function of Will Contests*, 44 Mich. L. Rev. 502, 516-24 (1946). See a criticism of this procedure in Carey, *Jurisdiction Over Decedents' Estates*, 24 Ill. L. Rev. 44, 48-49 (1929).

60. Simes, *supra* note 59, at 528-38.

61. *Id.* at 557 n.248.

62. Wash. Rev. Code § 11.20.010 (1956).

63. Wash. Rev. Code § 11.24.020 (1956).

The element of non-finality may be a bar to the enforcement of a foreign probate decree. In order that the decree be entitled to recognition outside the state of rendition it must be final.⁶⁴ The fact that an appeal is pending does not mean that recognition will not be given; but if the appeal has the effect of vacating the original judgment then recognition must be denied.⁶⁵

Let us consider first the impact of vacation of the probate decree in the state of domicile without reference to the time sequence.

*Matter of Sands*⁶⁶ was a proceeding for probate of a will of a testator domiciled in New York who died leaving personal property wholly located in New York. Proponent was opposed by X who attempted to introduce in evidence an allegedly subsequent will which had been probated without notice in Missouri. Within the time permitted, and before the proceeding here, proponent had brought an action in Missouri to contest the probate. Under the law of that state this contest vacated the original probate and left the validity of the will as undetermined as if there had been no initial probate. Surrogate Beckett held that because of the contest in Missouri the will offered by X in opposition to the petition was inadmissible.⁶⁷

It should be noted that the will probated in Missouri was not recorded in New York. Would that have made a difference? This depends on the characterization given the New York statute. If it prescribes a rule of evidence only, then vacation or revocation of the domiciliary probate should make the record in New York inadmissible. If the recording in New York is equivalent to ancillary probate then it is arguable that a change in status at the domicile should not have any effect.

The latter point of view is demonstrated in two cases, *Foulke v. Zimmerman*⁶⁸ and *Allaire v. Allaire*.⁶⁹ In the former, the will of a New York decedent was admitted to ancillary probate in Louisiana upon exemplification of a record which revealed that an appeal had been taken from the order of probate in New York. It was held that purchasers under Louisiana probate were protected by reliance on that decree despite subsequent reversal of the probate decree in New York. In *Allaire v.*

64. Restatement, Conflicts §§ 435, 438 (1934).

65. Restatement, Conflicts § 435, comment c (1934); Note, 41 Colum. L. Rev. 878, 880-81 (1941).

66. 62 Misc. 146, 116 N.Y. Supp. 426 (Surr. Ct. 1909).

67. An alternative holding in the case is that since proponent was not a party to the Missouri proceeding, it could be ignored. This is no longer correct. *Matter of Horton*, 217 N.Y. 363, 111 N.E. 1066 (1916) reached the opposite result. Although the decision specifically reserved decision on the question if real estate were involved, 217 N.Y. at 370, 111 N.E. at 1068, there seems no basis for separate treatment of real and personal property.

68. 81 U.S. (14 Wall.) 113 (1871).

69. 37 N.J.L. 312 (Sup. Ct. 1875), aff'd, 39 N.J.L. 113 (Ct. Err. & App. 1876).

Allaire a will probated in New York had been admitted to ancillary probate in New Jersey during the pendency of an appeal in the former state. Notwithstanding the subsequent reversal of the New York probate the will was held admissible in an action of ejectment in New Jersey.⁷⁰

Both these cases involve true ancillary proceedings and protect purchasers relying on them. Since recording does not contemplate the judicial action of such a proceeding,⁷¹ it should not receive equivalent recognition.

If New York gives no blanket protection to a purchaser under a recorded will, the *Sands* decision does not mean that all non-final probate decrees will be inadmissible. The general rule in the United States is that a purchaser in good faith will be protected even though he acquires property during the period in which the will may be set aside.⁷² Missouri, on the other hand, is notorious for not giving the purchaser any protection until the contest period has lapsed.⁷³ A sound approach would be to give a recorded will the same effect it would have in the state of domicile. Thus, one claiming under a will probated in a jurisdiction which protects a subsequent purchaser in good faith would prevail. This is in harmony with the result in the *Sands* case. Alternatively, the wisdom of applying the principles stated therein to defeat the rights of a subsequent purchaser in good faith may be questioned because it will lead to substantial instability in real estate titles.⁷⁴

70. At the time this case was decided foreign wills were not recorded. There was a full hearing equivalent to the hearing in an original probate. Nixon, Digest of the Laws of New Jersey 1032 (4th ed. 1868). The court suggested that an alternative to rejecting or accepting immediately the will would be to postpone the action in which it is relied upon until the appeal is concluded. *Allaire v. Allaire*, 37 N.J.L. 312, 320 (Sup. Ct. 1875).

71. Carey, *supra* note 59, at 53.

72. 3 American Law of Property § 14.40, at 734-36 (Casner ed. 1952); Comment, 36 Mich. L. Rev. 120, 124-29 (1937); Annot., 26 A.L.R. 270 (1923).

73. 3 American Law of Property § 14.40, at 735-36 (Casner ed. 1952); Comment, 36 Mich. L. Rev. 120, 125 (1937).

74. Judge Depue who wrote the opinion of the court in *Allaire v. Allaire* was concerned with the problem of instability of titles. He stated,

"It is easy to see into what confusion we should be led by subjecting a judicial record of our own tribunals to the vicissitudes of litigations elsewhere, and what doubt and uncertainty would be thrown over the title to lands. No purchaser would accept title in which the will of a nonresident placed on record under the statute formed a link; nor would counsel venture to advise thereon until the records of the state or country in which the testator was domiciled had been explored, to ascertain what action its courts had subsequently taken on the original probate."

"The record, when once made, stands on its own inherent strength, like the record of the judgment of a court of this state, in a suit in which a foreign judgment is the cause of action. A subsequent reversal of the foreign probate, which was only evidence before the surrogate, will no more vitiate his decree than the reversal of a foreign judgment after it has been sued on and passed into a judgment of this state, will avoid the latter

It is advisable for the title examiner to become familiar with the law of the domiciliary jurisdiction and determine if the purchaser during the contest or appeal period will be protected against vacation of the probate. If so, even if the purchaser is protected, the examiner must decide whether to rely on the record in New York. In light of the preceding, the three possible sequences yield the following results.

Sequence 1: Since there is no element of estoppel the principles discussed above apply without change. If the domiciliary jurisdiction does not protect purchasers ancillary probate is apparently mandatory.

Sequence 2: The presence of estoppel may strengthen the purchaser's claim. If the domicile will not protect him, a cautious examiner will employ local counsel to check the estate status. Although protection is still not certain, the fact that the record of foreign proceedings shows pendency of an appeal will not necessarily prejudice a purchaser's rights.⁷⁵

Sequence 3: There is no justification for protecting a purchaser under the will in this situation.

Termination of Representative's Authority

Title may be traced through a conveyance by the representative of the estate, either under a power granted by the testator or through a proceeding for permission to sell a decedent's property.⁷⁶

If the representative has been appointed by a New York surrogate his authority is derived from a New York court and revocation of letters elsewhere will not automatically terminate his power locally.⁷⁷ Revocation of foreign letters is, however, ground for revocation of ancillary letters⁷⁸ and the fact determination of misconduct in the state of original probate may be conclusive.⁷⁹ Until proceedings for removal are started

judgment. And so long as the record of the surrogate remains in force, and is not annulled, the statute declares what effect it shall have as evidence." 37 N.J.L. at 323-24.

75. *Foulke v. Zimmerman*, 81 U.S. (14 Wall.) 113 (1871). But see Comment, 36 Mich. L. Rev. 120, 131-32 (1937).

76. N.Y. Surr. Ct. Act §§ 233-50.

77. *Matter of Roeben*, 171 Misc. 548, 13 N.Y.S.2d 53 (Surr. Ct. 1939), aff'd, 259 App. Div. 866, 20 N.Y.S.2d 401 (1st Dep't 1940), motion to dismiss appeal denied, 285 N.Y. 516, 32 N.E.2d 818, aff'd, 285 N.Y. 807, 35 N.E.2d 195 (1941). See also *Milner v. Hoag*, 182 App. Div. 524, 169 N.Y. Supp. 755 (2d Dep't 1918) (revocation of domiciliary authority does not bar suit against trustee in ancillary jurisdiction); *Huntington v. Moore*, 1 N.M. 489 (1871) (revocation of domiciliary authority no bar to suit by ancillary representative), rev'd on other grounds, 84 U.S. (17 Wall.) 417 (1873). But see *Matter of Gilleran*, 50 Hun 399, 3 N.Y. Supp. 145 (Sup. Ct. 1888); *State ex rel. Abercrombie v. Holtcamp*, 267 Mo. 412, 185 S.W. 201 (1916).

78. N.Y. Surr. Ct. Act §§ 101, 104(8).

79. *Matter of Roeben*, 171 Misc. 548, 13 N.Y.S.2d 53 (Surr. Ct. 1939), aff'd, 259 App. Div. 866, 20 N.Y.S.2d 401 (1st Dep't 1940), motion to dismiss appeal denied, 285 N.Y. 516, 32 N.E.2d 818, aff'd, 285 N.Y. 807, 35 N.E.2d 195 (1941).

purchasers in good faith should be protected.⁸⁰

If purchase is made from an ancillary executor who has only had indicia of his authority recorded under section 44 a change of status through removal should be treated in the same manner as a change of status through revocation of probate. Estoppel under these circumstances receives added support from the policy of protecting those who deal in good faith with estate representatives.⁸¹ Uniform treatment is appropriate and the same protection should be given those dealing with executors under recorded wills and administrators with recorded letters as given those dealing with local estate representatives.

POWER OF EXECUTOR TO ACT

Section 44 of the New York Decedent Estate Law provides in part that the documents recorded in the surrogate's office, "shall be presumptive evidence of such will and of the execution thereof and of the letters testamentary granted thereon. . . ."

Admittedly, if a purchaser from a devisee wishes to support his title he may introduce the will in evidence to establish his grantor's right to convey. Consider, however, the case where the grantor is an executor with power of sale. Is it necessary that the will not only be recorded but also that the executor qualify by securing ancillary letters? If so, failure to qualify would render the title unmarketable.

Fortunately the answer on this point appears clear. In *Pollock v. Hooley*⁸² the vendee under a contract for the purchase of realty sought to escape performance by asserting that an executor had no authority to convey land in New York until he had received ancillary letters. Testator's will had been probated in New Jersey, his domicile at death, and a copy of the proceeding had been recorded pursuant to the authority of section 2703 of the New York Code of Civil Procedure.⁸³ No letters testamentary had been issued. After disposing of several other arguments the court reached the question of the executor's power.

[I]t is further urged, upon the part of the respondent, that Shotwell had no right to act as executor in the exercise of the power of sale conferred by the will over real estate situated in this State. It might be sufficient, in answer to this suggestion, to call attention to the fact that, although there is a provision for the issuing of ancillary letters testamentary in this State in the cases of wills of personal property which have been admitted to probate in other countries, no such provision is made in respect to wills of real property situated within this State. . . . [The court sets forth the substance of the Code provision.]. There is no provision for the issuing of letters testamentary upon such a will; it evidently being the intention of the legislature that the existence of the power should be evidenced by the record here, and whether the

80. N.Y. Surr. Ct. Act § 85.

81. N.Y. Surr. Ct. Act § 85.

82. 67 Hun 370, 22 N.Y. Supp. 215 (Sup. Ct. 1893).

83. Now N.Y. Deced. Est. Law § 44.

donee of the power had qualified himself to exercise it was to be determined by what had been done at the place of the probate of the will.⁸⁴

The power of sale is personal and not derived from appointment as executor.⁸⁵ This being so, proof of the power is all that is necessary. It follows that the assignee of a mortgage from an executor who had not received letters in New York may still bring an action to foreclose the mortgage.⁸⁶ On the other hand, it is questionable whether a non-qualified representative may be a plaintiff in a foreclosure action.

It is the general rule, absent legislation, that a foreign representative may not bring an action to recover a debt owed to the decedent unless he has first qualified to act in the state of suit.⁸⁷ Section 160 of the New York Decedent Estate Law⁸⁸ permitted a suit by a foreign representative who had not qualified but this provision was repealed in 1926.⁸⁹ Thus, as to mortgage foreclosures outside the effective period of former section 160, a foreign representative without ancillary letters lacks capacity to sue.⁹⁰ If the foreclosure is under a power of sale given in the mortgage, qualification is not necessary⁹¹ unless it appears that the rights of creditors are jeopardized. In the latter case ancillary letters may be required.⁹²

The defense of lack of capacity to sue need not concern the attorney examining an old mortgage foreclosure since it must be raised during the proceeding. If the plaintiff does not have legal capacity to sue and the defect appears on the face of the complaint, a motion for judgment on the complaint is proper. The notice of motion must be served within twenty days of service of the complaint⁹³ or the defense is waived.⁹⁴ Similarly, a notice of motion for judgment on the complaint and affidavit must be made within the same period.⁹⁵ If it were not true that the defense of lack of capacity can be waived serious difficulties might arise. It has been held in Wisconsin under a statute of similar nature, although far from identical wording, that recording a will would only support a

84. 67 Hun at 377, 22 N.Y. Supp. at 219-20.

85. *Bacharach v. Spriggs*, 173 Ark. 250, 292 S.W. 150 (1927); *Pollock v. Hooley*, 67 Hun 370, 22 N.Y. Supp. 215 (Sup. Ct. 1893); *Bromley v. Miller*, 2 Thom. & Cook 575 (N.Y. Sup. Ct. 1874); *Restatement, Conflicts* § 491, comment c (1934).

86. *Smith v. Tiffany*, 16 Hun 552 (N.Y. App. Div. 4th Dep't 1879).

87. *Restatement, Conflicts* §§ 492, 507 (1934).

88. N.Y. Sess. Laws 1925, ch. 603.

89. N.Y. Sess. Laws 1926, ch. 660, effective April 29, 1926.

90. *Kirkbride v. Van Note*, 275 N.Y. 244, 9 N.E.2d 852 (1937); *Wikoff v. Hirschel*, 258 N.Y. 28, 179 N.E. 249 (1932).

91. *Averill v. Taylor*, 5 How. Pr. 476 (N.Y. Sup. Ct. 1850); *Doolittle v. Lewis*, 7 Johns. Ch. R. 45 (N.Y. Ch. 1823).

92. See *Averill v. Taylor*, *supra* note 91.

93. N.Y.R. Civ. Prac. 106.

94. N.Y. Civ. Prac. Act § 278.

95. N.Y.R. Civ. Prac. 107.

conveyance of the property and was not evidence of a foreign representative's authority to foreclose a mortgage.⁹⁶

PAYMENT OF DEBTS AND TAXES

As in the case of an estate of a New York domiciliary, it will be necessary to have evidence that all debts and taxes are paid.⁹⁷ It cannot be assumed that the absence of the decedent from the state means that there are no creditors in New York. Also, decedent's property in an ancillary jurisdiction may be used to satisfy debts incurred in another jurisdiction.⁹⁸

It is provided in the Surrogate's Court Act that the decedent's real property may be sold to provide for the payment of debts and legacies which are a charge on the realty.⁹⁹ Where there is a will the examiner should satisfy himself that the legacies which may be a charge have been paid. In the usual case this information will not be found in the file and it is necessary to acquire supplementary information from the domiciliary jurisdiction.

A proceeding to sell realty is to be commenced within eighteen months from the date when letters first issue.¹⁰⁰ In the case of a will recorded under section 44, letters are not issued to an executor or administrator and the eighteen months should be computed from the date of recording. The realty will thus be subject to sale for eighteen months in spite of the lapse of time between the domestic probate and recording in New York, unless the asserted claim is barred by the statute of limitations.

During the eighteen month period a purchaser's title will be subject to this power of sale. While this limitation alone is not sufficient to render the title unmarketable¹⁰¹ care should be taken where the existence of debts is suspected.

Payment of taxes must be checked in the same manner as in the case of a decedent domiciled in New York. When the decedent is a non-resident a tax is imposed upon all real property within the state.¹⁰² Taxes imposed by other jurisdictions should not be a problem except insofar as they are debts of the estate, but the New York Estate Tax creates a lien on the realty rendering title unmarketable.¹⁰³ If the estate

96. *Hayes v. Lieulokken*, 48 Wis. 509, 4 N.W. 584 (1880).

97. 1 *Flick*, op. cit. supra note 53, § 500.

98. *Matter of Green*, 130 Misc. 789, 226 N.Y. Supp. 436 (Surr. Ct. 1927); Annot., 81 A.L.R. 671 (1932); *Restatement, Conflicts* § 489 (1934).

99. N.Y. Surr. Ct. Act § 234.

100. N.Y. Surr. Ct. Act § 233. This proceeding may also be initiated during a judicial settlement but in the latter case purchasers from devisees receive protection not available during the initial eighteen month period.

101. *Forsyth v. Leslie*, 74 App. Div. 517, 77 N.Y. Supp. 826 (4th Dep't 1902); cf. *Hulse v. Hulse*, 5 N.Y. Supp. 747 (Sup. Ct. 1889). Contra, *Hall v. Partridge*, 10 How. Pr. 118 (N.Y. Sup. Ct. 1853).

102. N.Y. Tax Law § 249-p.

103. *Smith v. Browning*, 225 N.Y. 358, 122 N.E. 217 (1919).

involved is substantial, care must be taken that the intrastate lien for federal estate taxes¹⁰⁴ is discharged.

RIGHTS OF SURVIVING SPOUSES AND AFTERBORN CHILDREN

Finally, there must be considered the rights of surviving spouses and afterborn children. The surviving spouse may elect against the will within six months from the date when letters testamentary or letters of administration c.t.a. are issued and at the discretion of the surrogate may be permitted to elect in the following six months.¹⁰⁵ This right of election extends to estates of non-residents and when a will is recorded the six months is computed from the date of recording and not the date of probate in the domiciliary state.¹⁰⁶ Ordinary care in examination will take care of the possibility of election as the notice required will be found in the records of the surrogate's office.

A child born after the execution of the will is automatically entitled to a share of the estate¹⁰⁷ which he may obtain by bringing an action of ejectment.¹⁰⁸ It is impossible to be sure that there are no such children. In New York, however, the ages of minor children will be listed in the petition giving the examiner a basis for determining their rights. If the papers recorded with the foreign will do not give equivalent information it should be obtained from the state of probate.

CONCLUSION

The most troublesome problem is the effect of a change of estate status in the state of original probate. Legislation would be appropriate to protect the rights of persons relying on the record until a change is established in New York.¹⁰⁹ It would also appear advisable to have only two methods of establishing a will, original and ancillary probate. Because of the incomplete statutory scheme the present provisions for recording seem unsatisfactory.

In attempting to fill in some of the missing parts of the foreign record there will be a temptation to rely on affidavits. While the availability of affidavits may indicate little or no risk of trouble there is no assurance that they will be admissible in evidence.¹¹⁰ Taking the time to secure authenticated copies of the necessary parts of the foreign record may eventually prove worthwhile.

104. Int. Rev. Code of 1954, § 6324.

105. N.Y. Deced. Est. Law § 18(7).

106. *Matter of Tamburri*, 198 Misc. 809, 100 N.Y.S.2d 647 (Surr. Ct. 1950).

107. N.Y. Deced. Est. Law § 26.

108. N.Y. Deced. Est. Law § 28; *Smith v. Robertson*, 89 N.Y. 555 (1882).

109. E.g., Uniform Probate of Foreign Wills Act §§ 2, 3.

110. See 1 Warren, *New York Real Property* 201-02 (4th ed. 1950). But see *Forsyth v. Leslie*, 74 App. Div. 517, 77 N.Y. Supp. 826 (4th Dep't 1902) where the court relied, in part, on evidence supplied by affidavit.